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The State of Utah v. C. W. Brady, Jr. : Brief of Respondent

In The Supreme Court of the State of Utah

THE STATE OF UTAH
Plaintiff-Respondent,
- vs. -
C. W. BRADY, JR.,
Defendent-Appellant.

Case No. 10653

Brief of Respondent

Appeal from the Judgement of the Third District Court for Salt Lake County, Honorable John F. Wahlquist, Judge

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STATEMENT OF NATURE OF CASE

The appellant, C. W. "Buck" Brady, Jr., appeals from his conviction of first degree perjury in violation of Section 76-45-7, Utah Code Annotated, 1953, upon jury trial in the District Court of Salt Lake County. The Honorable John F. Wahlquist, judge, sitting at request.

DISPOSITION IN THE LOWER COURT

The appellant was indicted for the crime of first degree perjury by a grand jury convened during 1965 in Salt Lake County, State of Utah. Appellant made several pretrial motions to quash the indict-

ment, which were denied by the trial court. The appellant stood mute at the time of arraignment, and a plea of not guilty was entered. A motion to suppress certain evidence given before the Honorable Maurice D. Jones, Judge of the City Court of Salt Lake City, was filed and denied. Upon jury trial, the appellant was found guilty and judgment was subsequently pronounced. A motion for new trial was filed and denied.

RELIEF SOUGHT ON APPEAL

Respondent submits that the conviction should be affirmed.

STATEMENT OF FACTS

The respondent submits the following statement of facts as being more in keeping with rule that the evidence on appeal will be viewed in a light most favorable to the jury's verdict.

The indictment in the instant case charged the appellant with the commission of perjury in the first degree on May 7, 1965, by falsely testifying before Honorable Maurice D. Jones, a magistrate and city judge of the City Court of Salt Lake City (R. 1). The indictment returned by the Salt Lake County Grand Jury against the appellant sets out various particulars in which it is claimed that the appellant perjured himself.

The first allegation material to this appeal, in view of the trial court's instructions, is captioned "A"

in the Schedule A of the Appendices to the appellant's brief and goes to the question as to whether, subsequent to the time the appellant returned to Salt Lake after a trip to Indiana to view a "bitpaver," the county was testing a bitpaver and whether there were reports submitted to the appellant as to the results of any test. The appellant responded to each of the questions posed on the subject in testifying before Judge Jones and said in effect that the county was testing the bitpaver and that Mr. Nerdin had contacted him "quite frequently and went out to the scene quite frequently to see the tests."

The second area of the indictment where the State contended the appellant had committed perjury is that identified in the appellant's brief by the letter "B" in Schedule A of the Appendices. This testimony given before Judge Jones by the appellant was to the effect that the bitpaver machine was used in the Chesterfield area right up until Christmastime. Also encompassed in the appellant's testimony at this time was a statement that he did not know that the bitpaver had not been used in January through February, 1964, nor did he remember discussing the fact with a member of the Indiana Toll Road Commission that they would not use their bitpaver subsequent to Labor Day and until the following May.

The third area of the indictment, referenced as letter "C" in Schedule A of the Appendices of appellant's brief and in relation to the portion of the

indictment that the court instructed on in Instruction No. 6, was testimony by the appellant that the bitpaver machine was used up until December, 1963 when weather moved in, and that the machine had been left in Chesterfield; and, subsequently, the machine was taken from Chesterfield back to the county road shops sometime in January.

The fourth portion of the appellant's testimony which the court instructed on as being false in Instruction No. 6 is that portion set out in referenced letter "D" of Schedule A of the Appendices of the appellant's brief as to the type of equipment that the appellant had leased in the past for the county. The appellant replied that a garbage packer and some sweepers had been leased.

The four areas indicated above were those areas which the trial court instructed the jury in relationship to the evidence and, consequently, those areas upon which the facts must be viewed in a light most favorable to the jury's verdict to determine if that evidence is sufficient as a matter of record to support the jury's conclusion.

Judge Maurice D. Jones of the City Court of Salt Lake City was called as a witness (R. 108). He testified that plaintiff's Exhibit 1, which is a John Doe complaint, charged the suspect with accessory to the crime of attempting to bribe an executive officer, and was prepared by the Salt Lake County Attorney's office. He issued the complaint on April 22, 1965 (R. 108). He stated that the complaint was never given a file number and that the carbon and

original of the complaint were apparently left with the Salt Lake County Attorney after the hearing and at the time a second complaint was issued against appellant (R. 109, 110, 112). Up until that time, Judge Jones kept the John Doe complaint in his possession. Subsequent to the issuance of the complaint, the appellant, C. W. "Buck" Brady, appeared before Judge Jones, when the complaint was in his possession. He appeared with counsel and was sworn by Judge Jones and, thereafter, testified. Judge Jones interrogated the appellant on a question and answer basis concerning certain activities of the appellant as Chairman of the Salt Lake County Commission and head of the Division of Roads and Bridges and, more specifically, with reference to the lease by the county of a bitpaver (Tr. 114). (plaintiff's Exhibit 2)

Mr. Ned Greenig testified that on May 7, 1965, he was the court reporter who took the testimony of the appellant during the interrogation conducted by Judge Jones (Tr. 116). Exhibit 2 was admitted into evidence and read to the jury and formed the basis of the alleged false testimony for which the appellant was charged with perjury. The appellant testified before Judge Jones in accordance with the outlined categories noted above and indicated, with some particularity, that the bitpaver machine leased from Midvale Motors, Inc., was used in the Chesterfield area, Salt Lake County, up until approximately Christmastime (plaintiff's Exhibit 2).

Mr. Hubert H. Nielsen testified that he was the owner of a Temco Bitpaver comparable to that

identified in plaintiff's Exhibit 3. He did business as Bonneville Equipment Incorporated. During the early part of the year 1963, he had for sale a bitpaver engine and pump engine, which is a highly capable piece of road maintenance and construction machinery that mechanically lays down asphalt and road mat (Tr. 161). The bitpaver had been used approximately 120 hours and was a used machine (Tr. 161). Mr. Nielsen attempted to negotiate for the sale of the bitpaver with Salt Lake County and contacted Mr. Boyd Nerdin, Superintendent of the Salt Lake County Roads and Bridges (Tr. 161). This was in, approximately, May of 1963 (Tr. 161). Initial negotiations were conducted and a second conversation was had between Nielsen and Nerdin at Nielsen's home. Nerdin indicated that possibly the appellant, Mr. Brady, might be interested in the machine for the county (Tr. 164). Mr. Nielsen was advised by Mr. Nerdin to contact Mr. Ted Newsom as an individual close to Mr. Brady (Tr. 165). The testimony with reference to the advice was not offered as to the truth of what was said, but merely to show the action taken by Mr. Nielsen after the advice.

Mr. Nielsen had two meetings with Mr. Newsom at which the bitpaver was discussed (Tr. 166-167), and received an indication that the appellant, Mr. Brady, would like to see the machine in operation. Arrangements were made by Mr. Nielsen to take the appellant back to the Indiana Toll Road outside of Gary, Indiana, to observe a bitpaver in operation. Mr. Nielsen made arrangements to take the appel-

lant to Indiana and Mr. Newsom accompanied them (Tr. 168). While back there, Mr. Nielsen, Mr. Newsom and the appellant observed the bitpaver in operation and were advised by a Mr. Shemahorn and a Mr. Mallott, employees of the Indiana Toll Road, that they "put their machine to bed" at "Labor Day, regardless of weather." (Tr. 169). Mr. Nielsen testified that he discussed the possible purchase of the bitpaver by the county with the appellant in a motel in Indiana and on the plane returning to Salt Lake City (Tr. 170). He told the appellant that he was interested in selling the machine and mentioned the price of $29,000.00 (Tr. 171). The appellant indicated that he was impressed with the performance of the machine, but had some budgetary problems (Tr. 171). Mr. Nielsen also indicated that he suggested to the appellant that the county lease the machine for a month or two to see how it worked (Tr. 171).

Subsequent to returning to Salt Lake City, after viewing the operation of the bitpaver in Indiana, Mr. Nielsen had conversations with Mr. Newsom in an effort to obtain the sale of the machinery to the county (Tr. 172). He had a conversation with Mr. Newsom on the 7th or 8th day of August, 1963, in which Newsom indicated that the appellant was very definitely interested in the machine, but that he still had budgetary problems (Tr. 173). Newsom then advised Nielsen that if he wanted to get the machine out of his hair that he ought "to sharpen his pencil and get down to the lowest possible price." Newsom indicated that Midvale Motors, Inc.

was willing to purchase the machine (Tr. 173). It was indicated further that the county and the appellant desired to have some test of the performance capabilities of Mr. Nielsen's bitpaver. Arrangements were made to test the bitpaver in West Jordan, Salt Lake County, and attempt to set up some other test area in which to run patterns as to the machine's performance (Tr. 174). A test pattern was run in the West Jordan area. Mr. Newsom advised Mr. Nielsen that he was president and major owner of Midvale Motors, Inc. (Tr. 175). This statement by Mr. Newsom was apparently untrue, as Mr. John K. Russell testified that he was the accountant for Motor Lease, Inc. and that Mr. Neuman C. Petty was the president and majority stockholder of Midvale Motors, Inc., and that to his knowledge, Mr. Ted Newsom had no position with Midvale Motors, Inc. A sale of the equipment was made by Mr. Nielsen to Midvale Motors, Inc., on August 22, 1963, for the sum of $18,700.00. Mr. Nielsen was paid a cashier's check signed by Ted M. Newsom as president of Midvale Motors, Inc. (Tr. 176). Mr. Nielsen, prior to the sale of the bitpaver to Midvale Motors, Inc., had submitted an offer to Mr. Newsom c/o Motor Lease, Inc., indicating a purchase price of $29,950.00 (Tr. 178). (defendant's Exhibit 5). This is approximately the same price for which the machine had been offered to Salt Lake County.

Subsequent to the purchase of the machine by Midvale Motors, Inc., a lease was negotiated between Midvale Motors, Inc., and the Board of County Commissioners of Salt Lake County (Exhibit 4-P).

The lease was for five consecutive months, commencing on the 23rd of August, 1963, and ending on the 22nd day of February, 1964, and provided for a $4,000.00 per month rental. The lease also provided that all payments were to be made prior to December 31, 1963, but that the lease was cancelable. At the time of the lease, Commissioners Cannon and Jensen were present, and the lease was approved (Tr. 184). The record reflected that on December 23, 1963, the appellant sent a letter to the Salt Lake County Auditor, requesting payment of $4,000.00 on the lease rental. All previous payments had been made.

Mr. John Van Ausdal, an employee of Salt Lake County Roads and Bridges Division, testified that he had been operating the bitpaver ever since 1959, and prior to his employment with Salt Lake County, was employed by Bonneville Equipment Co. (Tr. 209). Mr. Van Ausdal started to work for the county using the bitpaver before the first lease with the county was consummated. He also testified that he laid down test patterns for the county prior to the sale of the bitpaver (Tr. 210). He indicated that the bitpaver had not been used subsequent to Thanksgiving day, 1963 because of brake damage (Tr. 211), and that its use immediately prior to breakdown was in the Chesterfield area of Salt Lake County (Tr. 211). He testified that after the bitpaver was shut down in November of 1963, it was not again used by the county until April or May of 1964. He further said the bitpaver was taken to the county shops at the same time the use was discontinued (Tr. 211, 212).

Mr. Stanley Thayne testified that he was the "seal coat foreman" for the Salt Lake County Roads and Bridges Division and that the bitpaver was used for the last time in the year 1963 around the 15th or 20th of November. He further testified that the machine was brought into the Salt Lake County Road Shops before Thanksgiving, and was not subsequently used until May of 1966 (Tr. 221, 222).

Mr. Joe Riccardi, office clerk of the Salt Lake County Roads and Bridges Division, indicated that employees kept daily time sheets and that a daily report on the "chips" spread by the bitpaver was kept by him (Tr. 235). The report was prepared by Mr. Riccardi from information and documents supplied by employees of the Salt Lake County Roads and Bridges Division, and entries were made in the report periodically. Exhibit 21 was the report for the period of the lease between Midvale Motors, Inc., and Salt Lake County, entered into in August of 1963. It showed that there were no chips spread after November 15, and that the work done by the spreader at that time had been in the Chesterfield area of Salt Lake County. In addition, reports from the Salt Lake County Roads and Bridges Division showed that the bitpaver received little or no gasoline and oil servicing subsequent to November of 1963 (plaintiff's Exhibit 20). Records in the county road shops disclose that there were no asphalt oils purchased by Salt Lake County from its two distributors for use with the bitpaver after November 4, 1963 (plaintiff's Exhibits 16 and 17). Testimony was also received that the bitpaver could not operate in wet

weather, and Exhibit 23 received by the court on stipulation, showed the local climatological data for Salt Lake County in the months of November and December, which indicated substantial precipitation from the 15th of November on in 1963. On the 15th of November, Salt Lake Valley received 5.8 inches of snow (p. 1 Exhibit 23).

The payments on the lease of August 23, 1963, had been paid by check of $8,000.00 on September 26, $4,000.00 on October 25, $4,000.00 on December 23, and $4,000.00 on January 10. (plaintiff's Exhibit 31). The appellant, on December 2, 1963, requested approval of the payment of $4,000.00 to Midvale Motors, Inc., for the rental of the bitpaver by the Salt Lake County Department of Roads and Bridges during the month of November. On December 23, 1963, a letter was sent by the appellant to the Salt Lake County Board of County Commissioners requesting payment of $4,000.00 to Midvale Motors, Inc., for the rental of the bitpaver during the month of December.

Mr. Thomas McKean, a sales engineer for Cate's Equipment Co., testified that an Alles-Chalmer's tractor was sold to Motor Lease, Inc. of Salt Lake County for $43,851.00. Exhibits 15, 18, and 19, which were received by the court, disclose that Motor Lease, Inc., had proposed in May of 1963 to lease the tractor to Salt Lake County for a 48-month period at $1,994.00 per month. Commissioner Marvin G. Jensen testified that the agreement was never completed, because he questioned the appellant on

whether the lease rental was excessive (Tr. 267). Commissioner Jensen testified that he told the appellant that the proposed lease contract with Motor Lease, Inc., would be in excess of $80,000.00 and not in the best interest of the county, since the same piece of equipment could be purchased for $53,000.00 (Tr. 268-269). Commissioner Jensen testified that the lease with Motor Lease, Inc., to lease the tractor for one month (plaintiff's Exhibit 18) was entered into because the county had already been using the equipment. Subsequently, a lease from June 15, 1963, to June 14, 1965, was entered into by Salt Lake County Roads and Bridges and Motor Lease, Inc., whereby Motor Lease, Inc., leased to the county the same tractor referred to above. The lease was signed by Ted Newsom as manager for Motor Lease, Inc., and ran from the 15th day of June, 1963, to the 14th day of June, 1965, or a period of 24 months. The lease was for $3,000.00 the first six months and $1,080.00 per month for the remaining 18 months (plaintiff's Exhibit 19). Commissioner Jensen testified that proposed leases on equipment would come through the Salt Lake County Roads and Bridges Department, which was headed by the appellant. The two leases with Motor Lease, Inc., for the tractor did not go through the commission because of Commissioner Jensen's apparent unfamiliarity with the procedure.

Subsequent to the expiration of the lease between Midvale Motors, Inc., and Salt Lake County Roads and Bridges, on the 15th day of June, 1964, the appellant, acting for the Board of County Com-

missioners of Salt Lake, executed a second lease with Midvale Motors, Inc., for the lease of the bit-paver from the 1st day of June, 1964, to the 30th day of November, 1964, for $4,000.00 at the time of execution and five equal payments of $4,000.00 (Tr. 196).

Based upon the above evidence, the jury returned a verdict finding the appellant guilty of perjury in the first degree.

ARGUMENT

POINT I

THE EVIDENCE IS SUFFICIENT TO SUPPORT THE VERDICT OF THE JURY FINDING THE APPELLANT GUILTY OF FIRST DEGREE PERJURY.

The appellant contends that the evidence offered at trial was insufficient to sustain his conviction. The respondent submits that the evidence presented amply supports the conviction, when the case is reviewed in a light most favorable to the jury's verdict. In **State v. Ward,** 10 Utah 2d 34, 347 P.2d 865 (1959), this court observed as to the proper manner of viewing a contention that evidence offered at trial was insufficient to sustain the jury's verdict:

> "The rules governing the scope of review on appeal as to the sufficiency of the evidence to sustain the verdict are well settled: that it is the prerogative of the jury to judge the credibility of the witnesses and to determine the facts; that the evidence will be reviewed in the light most favorable to the verdict; and that if when so viewed it appears that the jury

acting fairly and reasonably could find the defendent guilty beyond a reasonable doubt, the verdict will not be disturbed."

Section 76-45-1(1), Utah Code Annotated, 1953, defines perjury as follows:

> "A person is guilty of perjury who
>
> (1) Swears or affirms that he will truly testify, declare, depose or certify, or that any testimony, declaration, deposition, certificate, affidavit or other writing by him subscribed is true, in, or in connection with, any action or special proceeding, hearing or inquiry, or on any occasion in which an oath is required by law or is necessary for the prosecution or defense of a private right or for the ends of public justice or may lawfully be administered, and who in such action or proceeding or on such hearing, inquiry or other occasion wilfully and knowingly testifies, declares, deposes or certifies falsely or states in his testimony, declaration, deposition, affidavit or certificate any matter to be true which he knows to be false."

Section 76-45-7, Utah Code Annotated, 1953, defines perjury in the first degree as follows:

> "A person is guilty of perjury in the first degree who commits perjury as to any material matter in or in connection with any action or special proceeding, civil or criminal, or any hearing or inquiry involving the ends of public justice or on an occasion in which an oath or affirmation is required or may lawfully be administered."

Consequently, before this court may overturn the appellant's conviction of perjury in the first de-

gree, it must find from viewing the evidence in a light most favorably **against the appellant** that no reasonable jury or judge could have concluded that the evidence presented demonstrated a violation of the above cited statutes.

Further, although the trial court instructed on four general areas of appellant's testimony before Judge Jones, if the evidence is sufficient to show perjury in reference to any particular of the testimony given, the fact that with reference to other matters concerning which appellant testified, the evidence was not sufficient, will not preclude conviction and affirmance by this court.

In **State v. Anderson,** 35 Utah 496, 101 Pac. 385 (1909), this court observed:

> "The information contains several assignments of perjury not here enumerated, which contain statements alleged to have been made by defendant in the same case, and at the same time, and of the same general character as the foregoing; but the court, in its instructions to the jury, withdrew all except those we have enumerated from their consideration. It will be observed that the several assignments contained in the information consist of certain alleged successive statements made by defendant while testifying as a witness, and are so related to the one question which was the subject-matter of inquiry in the action in which the testimony was given, and were so linked and blended together in the point of time, as to constitute but one act or transaction, and therefore constitute but one offense. And, furthermore, the authorities seem to uniformly hold that all matters to which the defendant swore falsely may be embraced in one

count (2 Wharton's Crim. Law, sections 1299, 1301; Wharton's Crim. Proc. and Pr., 251; Commonwealth v. Jones, 6 Gray [Mass.] 275; Commonwealth v. McLaughlin, 122 Mass. 449; Adellberger v. State [Tex. Cr. App.], 39 S.W. 103; De Bernie v. State, 10 Ala. 23; Railroad v. Callahan, 6 B. and C. 109). **And proof of the falsity of any one of them will support a general verdict of guilty (such as was rendered in this case), although the other assignments in the information are not sustained by the evidence.** (2 Wharton's Crim. Law [9 Ed.], section 1301; Wharton's Crim. Ev. [9 Ed.], 131; 16 Ency. Pl. and Pr., 350.)

We find no error in the record. The judgment is affirmed." (Emphasis added)

This position is very much in accord with overwhelming majority of cases and authorities. 41 Am. Jur., Perjury, sec. 47; 1 Wharton's Criminal Evidence, 10th Ed., sec. 131; 2 Wharton's Criminal Law, 12th Ed., sec. 1567; **State v. Taylor,** 202 Mo. 1, 100 S.W. 41; **Arena v. United States,** 226 F.2d 227 (9th Cir. 1955); **United States v. Crummer,** 151 F.2d 958 (10th Cir. 1945).

Consequently, if the evidence is sufficient on any particular of the indictment, the conviction must be affirmed.

In addition, the State submits that the contention of appellant set forth on page 4 of appellant's brief that proof of the perjury must be shown by direct and positive testimony of two witnesses or one witness and corroborating evidence is not necessarily the rule applicable in Utah. The Com-

piled Laws of Utah 1907 § 4748; Compiled Laws of Utah 1917 § 8848; Revised Statutes of Utah 1933 § 105-21-21 provided in part:

> **"Perjury must be proved by the testimony of two witnesses, or one witness and corroborating circumstances."**

See **State v. Gleason,** 86 Utah 26, 40 P.2d 222 (1935).

This provision, however, was subsequently repealed in 1935 with the adoption of the Code of Criminal Procedure, Laws of Utah 1935, Ch. 118, § 1. Consequently, there is an express legislative repeal of the two witness rule etc., and it must be concluded that the present rule is simply whether, taking the evidence as a whole, reasonable men could conclude beyond a reasonable doubt the guilt of an accused. The abandonment of the more rigid rules of proof is noted in 41 Am. Jur., **Perjury,** § 67, where it is observed:

> **"Although it seems once to have been the rule that to support a conviction of perjury the evidence of two witnesses was required to establish the falsity of the oath on which the indictment was based, it is now well settled that such a conviction may be had on the evidence of one witness supported by proof or corroborating circumstances, or by the testimony of two witnesses, or, where it is so provided by statute, by the accused's own confession in open court."**

See also 88 A.L.R.2d 852, 864.

Taking even the standard urged by appellant instead of a general standard normally applicable

in criminal cases, it is clear that the evidence in this case is amply sufficient to sustain the conviction.

A. **Testing the Bitpaver.**

The respondent agrees that the evidence presented at the time of trial was not sufficient to sustain a conviction based on alleged falsity of appellant's statements with reference to the testing of the bitpaver. The prosecution, at the time of argument, acknowledged to the jury the fact that the State did not rely on that portion of the indictment to support a conviction.

B. **The Use of the Bitpaver Up to Christmastime.**

It is submitted that the evidence on this issue is ample to sustain the appellant's conviction no matter what rule is applied. The appellant's testimony before Judge Jones was to the effect that the bitpaver was used "right up until Christmas." He expressly told Judge Jones: "We used this machine up until December, I'm sure, right until Christmastime." (Exhibit P-2). Thus, appellant's testimony before Judge Jones, when viewed in a light most favorable to the conviction, shows a definite and positive assertion by the appellant that the bitpaver machine was being used right up until Christmas of 1963. The machine was being leased by appellant's department for $4,000.00 per month, and the failure to use the machine during the period of the lease, where the lease was cancelable by the county at any time, would strongly evidence that Mr. Brady was not looking out for the best interests of

the citizenry in administering his department. Further, the lease price, itself, when appraised against the recent sales price of the machine immediately before the county leased it, makes the lease relationship suspect. Therefore, any inquiry relating to the actual use of the machine would be directly material to any inquiry concerning Commissioner Brady's administration of the County Roads and Bridges Division. Further, when Exhibit P-2 showed that the appellant acknowledged that Ted Newsom, who had purchased the machine and was connected with the lessor, had put up money ($2,000.00) for the purchase of property in Park City in which the appellant was to have an interest and the appellant had, as yet, paid nothing, for the use of the property (Exhibit P-2, pp. 26, 27, 28). The testimony, therefore, related to whether the payments made for the machine were actually needed or a means whereby county money was placed in the hands of the appellant's friends, who in turn returned it to the appellant in order to continue to do business with the county.

The jury was legitimately within its province if it found that the appellant, by his testimony before Judge Jones, was deliberately and knowingly trying to communicate the contention that the bitpaver had been used as much as possible and had not set idle for a long period while rental was paid on it. The appellant's testimony was a direct assertion that the machine had been used up until Christmas. He interjected this assertion to rebut the contention implicit in Judge Jones' question that

normal use of the machine would dictate putting it up on Labor Day and the appellant knew this, and thus, the lease was a coverup. The appellant had requested payment for the use of the machine under the lease during the month of December. If the machine had remained idle during this period, the appellant's motives would necessarily be suspect. Therefore, the straightforward declarations of the appellant that the machine was used up until Christmas clearly were knowingly and intentionally made, and the jury could reasonably so conclude. Appellant argues that it was a statement only of his belief, and there was no evidence that would show the falsity of his belief. This is a failure to appraise the evidence in the required light and also an argumentative assertion in the face of the direct statement of the appellant, "We used this machine up until December, I'm sure, right until Christmastime."

Clearly, the testimony of the appellant was proved false. Clearly, the testimony was false. Mr. John Van Ausdal, an employee of the Salt Lake County Roads and Bridges Division, testified that he had been the operator of the bitpaver since it was first used in 1959. He was responsible for its use. He had used the machine when it was owned by Bonneville Equipment Co. and had become an employee of the county when the machine was leased to the county. His testimony was clear and direct that the bitpaver had not been used subsequent to Thanksgiving day in 1963, because of brake

damage and was not used again until April or May of 1964.

Mr. Stanley Thayne testified that he was the "seal coat foreman" and was directly familiar with the use of the bitpaver. He testified that the machine was last used around the 15th or 20th of November, 1963, and brought into the Salt Lake County Road Shops before Thanksgiving and not subsequently used until May of 1966. Thus, two witnesses have specifically testified to the falsity of the appellant's statements, under oath, to Judge Jones. This is, itself, sufficient to sustain the conviction. The appellant, by his own testimony, indicated that he knew the time the machine was used. Further, his statement was much more than mere opinion or belief. It was a statement of fact, calculated to justify his misconduct.

In addition, Exhibit P-21, which was a record prepared daily by Mr. Joe Riccardi of the use of the bitpaver to spread chips, showed no chips were spread after November 15, 1963. The appellant assails the admission of the record because it was based on other information supplied by employees of the county to Mr. Riccardi. Appellant contends that the slips or documents on which the record was based must be produced under the theory of summary of voluminous records doctrine. Appellant misconstrues the law. The instant record was one kept in the regular course of business in the daily operations of the county. As such, it was admissible

in its own right. Thus, in 20 Am. Jur., Evidence, § 1051, it is noted:

> "It has become the rule in a great majority of the states to admit entries in books made in the ordinary course of business at or near the time of the transaction to which they relate, where properly authenticated according to the requirements of the particular jurisdiction."

The fact that the record may be based on other documents or information supplied is of no consequence, if the record, itself, is not prepared for the litigation and is kept as part of the regular course of business of the party or entity. Thus, in 20 Am. Jur., Evidence § 1061, it is stated:

> "Within the contemplation of the shopbook rule, the construction or form of the documents and the material used are not matters of importance if they are capable of perpetuating a record of events, and the charges thereon are fairly and honestly made in the regular course of business and as a part of the party's system of keeping his accounts, at or about the time of the transaction noted."

In 20 Am. Jur., Evidence, § 1062, it is observed:

> "Entries in books, in order to be admissible, ordinarily must have been made in the regular course of business and as a part of the party's system of keeping his accounts. The fact that the entries are made by clerks in the regular routine of their employment and under the natural impulse of employees to perform their duties accurately is the safeguard of the accuracy of them. Indeed, under the systems

> of bookkeeping in modern business houses, the mechanical precision with which numerous employees record various transactions, together with the absence of any personal motive to misrepresent the facts of the transactions, makes the modern book of accounts a very high form of evidence in respect of transactions that are the proper subject matter for a book of accounts."

It is recognized by the courts that many entries of records are based on intermediate slips and accounts, but this does not preclude the admissibility of the evidence. In 20 Am. Jur., Evidence, § 1066, it is acknowledged:

> "Under the modern methods of conducting business, the information relative to the transactions constituting the book accounts often must pass through various hands before being permanently recorded and some system of providing temporary memoranda preparatory to the permanent records is necessary in order to insure accuracy. It would be impracticable to preserve for any great length of time the tags, slips, or other tokens constituting such original memoranda and impossible, in view of the ever-changing army of employees, to obtain the testimony of the person who made the temporary memoranda or conducted the transaction. Hence, following the rule of necessity which originated the admissibility of books of account in evidence, the courts do not regard such temporary memoranda as the original entries, but look to the permanent records as such original entries, where properly verified."

The rule relating to the introduction of a summary of bulky documents too numerous to be prop-

erly handled in court is wholly unrelated to the rule dealing with business records, but relates to a situation where the documents themselves are the subject to be considered and a summary is made of their content. See 20 Am. Jur., Evidence, § 449, and more particularly, pp. 364 to 399, where it is clear that the voluminous documents rule is one relating to the best evidence rule as evidentiary proposition of no significance concerning Exhibit 21. This principle should be compared against the rule of business entries to which Exhibit 21 applies.

McCormick, Evidence, p. 600, notes as to the type of evidence admitted here:

> "Under this principle, the cash-book, and the day-book or journal, recording the transactions in chronological order and made up either from original entries or from entries taken from temporary slips or memoranda, would be admissible as the first permanent record. Upon the same basis, a ledger or other similar book, wherein the items of debit and credit are arranged under the names of the parties concerned, when made up day by day from memory or directly from the original slips or memoranda, would also be admissible. And where the ledger is made, not from memory or from the original slips, but from the journal, day-book and cash-book which are, in turn, based on the original slips, but is regularly, promptly, and systematically kept and is used and relied on in the operation of the business, it would seem that there could still be no sound reason against the ledger's admissibility. It is far more convenient for use in evidence than the slips or the journal, when the purpose is to reveal the whole state of an account.

See Model Evidence Act (1927); Uniform Business Records as Evidence Act §§ 1, 2 (McCormick, supra, p. 607). See also, **Joseph v. W. H. Groves Latter-Day Saints Hospital,** 7 Utah 2d 39, 318 P.2d 330 (1957); **Northcrest Inc. v. Walker Bank & Trust Co.,** 122 Utah 268, 248 P.2d 692 (1952); Polasky and Paulson, **Business Entries,** 4 Utah L. Rev. 327 (1955). Consequently, the appellant's contention that Exhibit 21 is unavailable to support the conviction is wholly unmeritorious.

Finally, the evidence as to the servicing of the machine and purchases of gasoline and asphalt show the bitpaver was not used, as the appellant testified. Also, the weather reports belie the claim of use after November 15, 1963. Under the circumstances, the evidence was more than sufficient to support the jury's determination.

C. **Taking the Bitpaver to the Shops in January.**

Appellant contends that the evidence was insufficient to show perjury, as respects the appellant's testimony as to when the bitpaver was taken back to the county shops. Again, the appellant, in his brief, fails to appraise the evidence in a light most favorable to the jury's verdict, but rather, makes his argument from the opposite position and argumentatively contends for every inference in the evidence in his own favor.

The appellant appeared before Judge Jones and stated that the bitpaver remained in the Chesterfield area of Salt Lake County and was not moved

back to the Salt Lake County Road Shops until sometime in January, 1964. It should be remembered that the lease in question was for five months duration —which would have terminated sometime in January, although the lease did say it was to continue until February 22, 1964. The appellant obviously could not explain why, if the bitpaver had not been used since November 15, 1963, the lease was not cancelled, or why the lease payment was made in December, when the bitpaver was not used and where the contract was cancellable. By telling Judge Jones that the machine had been in Chesterfield obviously would tend to support a contention that the machine was intended to be used in December and January if possible. This statement would be a justification, although a feeble one, for not canceling the lease and saving the county money for January and December. The January money, although prepaid, could have been recovered. If, as was suspected, the lease arrangement was one whereby Midvale Motors, Inc. would get additional money and the appellant would get a kickback or free use of a vehicle during his campaigns, the contention that the machine was not brought back to the shops until January would support an argument of legiti-

mate use or inadvertence. However, since the machine was returned to the shops in November, the appellant, as head of the department, should have acted to cancel the lease, unless there was some hidden reason for not doing so which was what Judge Jones was making inquiry as to. Thus, the

question was very material to the inquiry. The appellant made a flat assertion that he knew the machine was in Chesterfield until sometime in January. Thus, there is ample evidence to support the jury's conclusion that the appellant knowlingly and wilfully intended to mislead Judge Jones in order to cover up his own inaction.

The evidence is very specific in showing the date the machine was returned to the shops. Mr. Van Ausdal, the operator, specifically testified that the machine was taken to the shops at the time the brake coupling broke (Tr. 211). Mr. Stanley Thayne testified:

> "Q Do you recall when it was brought into the shop, was it before or after Thanksgiving of 1963?
>
> A I believe it was before."

He further indicated that it was only about ten days after the breakdown that it was returned (Tr. 221). Finally, he indicated that there was no snow when the bitpaver was returned and there was five inches of snow received on the 15th of November. Consequently, the evidence was strong that the machine did not remain in the Chesterfield area until sometime in January. Further, the chip reports tend to corroborate the testimony of both witnesses. Thus, there was ample evidence to warrant the jury returning a conviction, 41 Am. Jur., **Perjury** § 67. The matter was clearly one for the jury. **Fletcher v. State,** 20 Wyo. 284, 123 Pac. 80 (1912); **Ayers v. State,** 20 Ariz. 189, 178 Pac. 782 (1918). As noted in the cited

cases, the question of intent, knowledge or willfulness in such cases, as well as materially, to some extent, is one of fact for the jury.

D. **Other Property Leased by the County.**

The final area where the respondent submits that the evidence was sufficient to sustain the jury's determination of guilt is that portion of the indictment charging that the appellant falsely testified as to other equipment that had been leased by the county. A reading of Exhibit P-2 makes it clear that Judge Jones was inquiring of ex-Commissioner Brady as to what other forms of equipment the Department of Roads and Bridges leased in order to determine whether the bitpaver incident, wherein a piece of equipment was leased for two separate occasions and the total amount paid by the county was more than twice the cost to the lessor, was a single affair or whether it was one of a pattern. The appellant's answer was clear that the other leased items were of minimal importance, a garbage truck or a sweeper. The appellant made no mention of the leasing of the Alles-Chalmers Crawler Tractor from Motor Lease, Inc.

The reason for the appellant's non-disclosure is obvious. Motor Lease, Inc. is a corporation with which Ted Newsom, who was connected with the bitpaver deal, was associated. Two leases covering the equipment were executed, both signed by Newsom and both leased for the Division of Roads and Bridges, which was appellant's department. The first lease (Exhibit P-18) was for a one month

period at $3,000.00. It was executed because a previous lease (Exhibit P-15) was not executed for reasons which are apparent and will be discussed later. The second lease (Exhibit P-19) was from June 15, 1963, to June 14, 1965, and, thus, was still in effect whe the appellant testified before Judge Jones on May 7, 1965. The second lease was for $3,000.00 for the first six months and $1,880.00 for the remaining eighteen months. Thus, the total amount the county was required to pay under the lease was $51,840.00, when the lease ran for only two years. Mr. Thomas McKean, a sales engineer for Cate Equipment Company, testified that the tractor was sold to Motor Lease, Inc. for $43,851.00 on the 21st of May, 1963, a few days before a proposed lease (Exhibit P-15) between Motor Lease, Inc. and the county was to have commenced. Further, the first lease (Exhibit P-18) ran from the 15th day of May or before Motor Lease, Inc. even had purchased the equipment from Cate for resale to the county.

Although Exhibits 18 and 19 were executed by Commissioner Marvin G. Jensen for the county, they were entered into on behalf of the Division of Roads and Bridges, of which the appellant was in charge (Tr. 263). Commissioner Jensen merely executed the leases because the purchasing department was under his jurisdicition. He testified that he would not interefere with the internal operations of Roads and Bridges (Tr. 264). Jensen testified that Roads and Bridges would draw up the specifications or the commissioner in charge would indicate the equip-

ment he needed and "make recommendations for the leasing of the equipment." (Tr. 264).

Jensen said with reference to Exhibit 15, a proposed lease, that he had a conversation with the appellant. He testified:

> "A. Something like that Commissioner Brady asked me if I had signed this and I told him I hadn't and he stated the urgency of getting the piece of equipment, something to this effect, and he said, I told him "I wouldn"t sign it." He said, "if you don't sign it or else, he would bring it before the county commission." At that time I told him that if he wanted to bring it before the commission why it would be fine, if you want to talk to me about this after the commission meeting I will be happy to point out some of the factors in the contract."

He then said after the meeting that he pointed out a few facts to the appellant, mainly that the lease was for over $80,000.[1] Thereafter, the lease was dropped and the two leases, totalling $54,840.00 were executed. The importance of Exhibit 15 could hardly be said to inflame the jury, as appellant so theatrically suggests; rather, it was shown that the appellant was well aware of the circumstances leading up to the two leases he failed to disclose to Judge Jones, and that his motive may well have been to cover up the proposed lease in order to avoid the obvious inference that the bitpaver was not the only questionable transaction in which the appellant, New-

(1) It should be remembered that Motor Lease, Inc. was going to purchase the machine for $43,851.00.

som and Neuman C. Petty[2] were involved. Consequently, it was most relevant evidence.

Further, the two leases executed were in excess of the purchase price and undoubtedly could have reflected upon the appellant, thus **providing the reason for** the failure to disclose and for giving of the false testimony as to the leases entered into by the county. Further, since the appellant had told Jensen of the urgency of the need for the equipment and there was the exchange between the appellant and Jensen, this, when coupled with the fact that the leases were for the appellant's department, that he had knowledge of the impending transaction, that requests to lease were initiated from the department concerned with a recommendation for leasing, and the one lease was still in effect when the appellant testified, shows that there is ample evidence on which the jury could have concluded that the appellant intentionally failed to disclose the existence of the other leases with the persons who had previously testified (a fact of which Brady was appraised).

Since questions of intent in perjury cases are usually for the jury, this court could not conclude that the jury and trial court were amiss in this instance. The California court in **People v. Morris,** 138 Cal.App.2d 317, 292 P.2d 15 (1956), in the face of comparable contentions, affirmed the conviction. In **People v. Dixon,** 99 Cal.App.2d 94, 221 P.2d 198

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(2) Brady was advised that Neuman C. Petty had already testified before Judge Jones as had Ted Newsom (Exhibit P2, p. 2).

(1950), the court observed:

> "In every case perjury must be knowingly false, and in every case the defendant's actual state of mind cannot be directly proved. It is for the jury to say in every case of perjury whether the defendant believed the truth of his testimony when he gave it."

When the inferences that may be drawn from the record are weighed in a light most favorable to the jury's verdict, the court must conclude that there is sufficient evidence to convict on the testimony of the appellant, as respects other items of equipment leased by the Salt Lake County Roads and Bridges Division.

In summary, the evidence is overwhelmingly in support of three of the four particulars of false testimony outlined in the indictment and the bill of particulars furnished by the district attorney. Since only one is sufficient to convict, it is obvious that taking the evidence most favorable to the respondent, it must be concluded that the evidence supports the jury's verdict.

POINT II

THE TRIAL COURTS RULINGS ON THE ADMISSION OF EVIDENCE PROVIDE NO BASIS FOR REVERSAL.

A. Testimony of Judge Jones.

The appellant contends that during the testimony of Judge Jones the trial court committed prejudicial error in not striking from Judge Jones'

answer as to what a particular exhibit was, the Judge's statement that it was an "amended complaint." Thereafter, appellant goes on to make various arguments in his brief without, in any way, enlightening the reader on what basis he contends error was made.

The testimony of Judge Jones was obviously relevant. Judge Jones was the magistrate before whom the testimony of appellant was given. Exhibit P-1 was a copy of the John Doe complaint which was the jurisdictional basis of the inquiry before Judge Jones. It was completely relevant. It was the only document presented to the jury or read to the jury. It merely identified the nature of the inquiry and provided the jury with essential information so that they could understand the reason for the appellant's testimony before the Judge. At the time of its offer by the district attorney, the appellant's counsel objected to the receipt of the document and took the witness on voire dire. Previously, Judge Jones had identified the exhibit (Tr. 108). Counsel, apparently after voire dire, objected to the admission of the document, not on the basis of relevancy, materiality or other evidentiary basis, but upon one of the same theories he argued for suppression of Judges Jones' interrogation of Brady. Without reaching that issue, the district attorney sought to lay further foundation for the admission of the exhibit. He then took the court file and asked the Judge to identify Exhibit P-2, attached thereto (Tr. 21), so that the continuity of Judge Jones' action could be determined. The Judge characterized the exhibit in the

file as an "amended complaint" (Tr. 110). An examination of the record reveals that this is probably what it was in fact. The file document was a photocopy of the original of Exhibit P-1 and Judge Jones identified the signatures and markings he made thereon. Exhibit P-1 was received.[3] Clearly, Exhibit P-1 was relevant; the "amended complaint" was not shown to the jury nor identified as anything but a copy of Exhibit P-1. At the time, there was no objection offered to Exhibit P-1 on the basis of its being "inflamatory." The characterization by Judge Jones of the photocopy as an "amended complaint" would hardly, without more, have meant anything to the jury. It rested within the sound discretion of the court to determine whether the jury could understand the matter. A more innocuous claim of error would be hard to imagine.

Section 77-42-1, Utah Code Annotated, 1953, requires any error to be prejudicial and "affect the substantial rights" of an accused before reversal is in order. **State v. Romeo,** 42 Utah 46, 128 Pac. 530 (1912). Obviously, this action of the trial court, if it was error at all, was, at the best, the most harmless error.

B. **Testimony of the Witness Nielsen.**

The appellant contends that the trial court committed prejudicial error in admitting into evidence the testimony of Hubert H. Nielsen as to the preliminary inquiries and negotiations he had with Mr.

(3) The only objection raised was that of "no foundation."

Boyd Nerdin, the Superintendent of the County Road Shops, and with Mr. Ted Newsom **before the lease between the county and Midvale Motors, Inc. was executed** for the bitpaver.[4]

Mr. Hubert H. Nielsen was the original owner of the bitpaver. He was the alter ego of Bonneville Equipment Inc. (Tr. 159). He testified that he had the bitpaver **for sale in 1963.** He testified that he negotiated with Mr. Boyd Nerdin, Superintendent of Salt Lake County Roads and Bridges, for the machine. The district attorney asked if he had a conversation with Nerdin concerning the machine and the court ruled the conversation to be "res gestae" and part of a "business transaction." Nielsen testified thereafter that he went into "some detail on the bitpaver with the idea of trying to interest Salt Lake County Roads and Bridges in" the machine (Tr. 162). The following then occurred (Tr. 162):

> "Q Other than the details of the equipment itself, was there anything said about the purchase of it or attempt to purchase it?
>
> A Well, naturally, when you are trying to sell something you are talking purchase, buy and sell.
>
> MR. GUSTIN: I move that be stricken. It is a conclusion and doesn't purport to be a part of conversation.

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(4) The appellant in his brief implies the conversations took place after the execution of the lease; this is not true and hence renders inappropriate most of the challenges made in appellant's argument on the issue.

THE COURT: The objection is overruled. I believe it is an insult to the jury to quibble into this matter. Ask your next question."

Thus, the only evidence was that an effort was made by Mr. Nielsen to sell the machine to Salt Lake County. Contrary to the bold statement in appellant's brief, p. 24, there were negotiations preliminary to a proposed sale to Salt Lake County. The **operative fact of the conversation** that was had with Nerdin and the subject matter discussed, as well as the nature of the negotiations, were clearly not hearsay. They were preliminary facts to show how the bitpaver transaction occurred and **why** the appellant perjured himself before Judge Jones. It is well settled that the hearsay rule is not applicable to declarations as operative facts. Judge Wahlquist, of course, saw this and validly overruled the objection. McCormick, Evidence, pp. 463-464 (1954).

In **State v. Sweeney,** 180 Minn. 450, 231 N.W. 225 (1930), the Minnesota Supreme Court held that conversations with third persons relating to negotiations for bribes and the whole transaction was admissible as operative facts. The Pennsylvania court reached a similar conclusion in a prosecution for corrupt solicitation of a juror, **Commonwealth v. Wiswesser,** 134 Pa. Super. 488, 3 A.2d 983 (1939). Conversations in furtherence of expected trade are recognized as admissible, **Glassman v. Barron,** 277 Mass. 376, 178 N.E. 628 (1931). See also Wigmore, Evidence, 3rd Ed., §§ 1770, 1772, 1777.

In **Hawkins v. Perry,** 123 Utah 16, 253 P.2d 372 (1953), this court recognized the rule and allowed conversations at the time of a transaction, noting:

> "They are the verbal acts which go to make up the very transaction which is under scrutiny to determine its legal effect. The fact that promises and representations were made is material to the issues of this action; they do not evidence 'the truth of the matter * * * asserted therein * * *,' at least in the sense that Wigmore uses that phrase."

See also Wade J., concurring in **John C. Cutler Ass'n v. De Jay Stores,** 3 Utah2d 107, 279 P.2d 700 (1955):

> "However, if the fact of whether or not the statement was made is a material issue in the case, or the statement accompanies an ambiguous or equivocal act serving to complete and give it definite legal significance it is a verbal act which constitutes a material fact in the case or if the fact that such statement was made is a circumstance which tends to prove a material issue in the case such a statement is not being used as testimonial evidence of the statement made on the credit of the person mak ing the statement who is not a witness and therefore is not hearsay evidence. Where the 'question is not whether the statements are true, but whether they were made' such statements are not excluded by the rule against hearsay."

Obviously, the objection was properly overruled. The fact that the court characterized counsel's objection as quibbling was of not compelling consequence. The objection to the evidence had been

previously overruled, and it appeared that the court was proper in reminding counsel of the need to avoid unnecessary interruption and argument. No prejudice can be assigned on this point.

The next portion of the testimony challenged it as to whether the appellant's name came up in the conversation. The following occurred (Tr. 163):

"Q Did Commissioner Brady's name come up in your conversation?

MR. GUSTIN: Now, if the Court please,—.

A. (Interposing) Yes.

Q I will ask you, was that with reference to the purchase of this machine?

A Yes.

Q I will ask you to relate the conversation as accurately as you can recall it?

A Well, I could—.

MR. GUSTIN: If the Court please, that couldn't have any probative and binding effect on this Defendant. We object to it as being hearsay.

THE COURT: The jury is instructed as follows: the hearsay principle in law basically is this: A says to B something that he saw or heard, and then B comes along and recites it as information that A has. This is distinguished from —for instance, if I go into a store and make a business transaction, whether it is completed or not completed, this is a different thing. A

business transaction is a thing just like an object is a thing, and a business transaction may be testified to regardless of whether someone else happens to or happens not to recite information. You may continue.

Q. Your answer to the question then?

A. Well, I asked Mr. Nerden if he would talk to Mr. Brady about getting some interest in the machine, to purchase it.

Q. Was there anything further, any further conversation at that time?

A. Well, no sir. He just said that he would do so. He would contact Mr. Brady and let me know."

Thus, the same rule is applicable in determining the admissibility of the evidence. Obviously, the conversation went to negotiations. The record shows that eventually appellant, Nielsen and Newsom went to Indiana to observe a bitpaver. The things that caused appellant to take the trip, the preliminary negotiations, were operative facts tending to explain the subsequent event.

As to the third area of challenge to the testimony of Nielsen and the rulings thereon, the following occurred:

Q. Subsequent to that conversation, did you have further conversation with anyone from Salt Lake County with reference to this machine or the purchase of this machine?

MR. GUSTIN: If it please the Court, no foundation, leading and suggestive.

THE COURT: Answer the question. Did you have a further conversation, answer yer, or no, with someone from Salt Lake County, if you can.

A. Yes, I talked with Mr. Nerden.

THE COURT: Just a minute. Lay a foundation.

Q. Can you tell us when and where that occurred?

A. Just a few days later, I would say maybe four or five days.

Q. And, where did that conversation take place?

A. Well, I met Mr. Nerden on the way home up on the east bench.

Q. Was anyone else present?

A. No, sir.

Q. Will you tell us what was said with reference to the purchase of the machine at that time?

A. Mr. Nerden said that he had talked with Mr. Brady about it, but he said that he says there is another man that is closer to Mr. Brady than anybody, whom I suggest that you talk to."

Note, that no objection to this testimony was made on the grounds of hearsay, so that if such was the nature of the testimony, the failure to properly

object to it on the appropriate grounds precluded any claim of error. Hearsay evidence not properly objected to may be validly received by the jury and considered by it. **Child v. Child,** 8 Utah2d 261, 332 P.2d 981 (1958); **White v. Newman,** 10 Utah2d 62, 348 P.2d 343 (1960); 79 A.L.R.2d 890 et seq. Further, it is submitted that the evidence was admissible for two reasons: (1) to show the effect on the hearer, and (2) part of the business transaction and, hence, an operative fact.

There is no question that evidence that might otherwise be characterized as hearsay may be received into evidence to show the effect of the evidence on the hearer. McCormick, Evidence, p. 464 (1954). Wigmore, Evidence, 3rd Ed., § 1789 notes:

> **"Wherever an utterance is offered to evidence the state of mind which ensued in another person in consequence of the utterance, it is obvious that no assertive or testimonial use is sought to be made of it, and the utterance is therefore admissible, so far as the Hearsay rule is concerned."**

The evidence was admissible to show the information on which Nielsen acted. **Emick Motors Corp v. General Motors Corp.,** 181 F.2d 70 (7th Cir. 1950). As a result of the conversation, the record is undisputed that Nielsen got hold of Newsom, had conversations with him and that the appellant became interested in the bitpaver. Consequently, the evidence was directly admissible and not objectionable.

Also, it is submitted that the evidence was admissible to show the setting of subsequent transactions and, thus, a part of the **res gestae** of the business transaction.

Finally, a third part of Nielsen's testimony is challenged by appellant. The district attorney asked what else had been said, without objection, and received the following answer (Tr. 164):

> **"A. Well, he said, "I suggest that you talk to him, Ted Newsom appeared in court, he said, "I think he might be able to help you on this type of thing." He is Mr. Brady's gubernatorial campaign manager and handled his affairs on anything that might reflect upon him."**

Counsel for appellant made a motion to strike on various grounds only two of which are relevant to this appeal. First, it is contended that the testimony was inflamatory; and, second, it is hearsay. The court denied the motion to strike. Respondent submits that the evidence was properly received. The appellant, having failed to make timely objection, cannot now complain if the evidence was hearsay. A motion to strike comes too late. Abbott, **Criminal Trial Practice,** 4th Ed., § 352. Further, the evidence was obviously not hearsay, because it was offered for the effect on the witness, and as noted above, is not objectionable as hearsay on such a basis. Nielsen testified almost immediately that, thereafter, he made further contact with Ted Newsom in an effort to sell the bitpaver to Salt Lake

County (Tr. 165). Obviously, the evidence was admissible.

The contention that it was inflamatory and aimed at prejudicing the jury cannot be accepted. The evidence was relevant to show Nielsen's actions and the reason in Nielsen's mind for his dealings with Newsom. It also ties Newsom in with the subsequent trip to Indiana. The evidence was directly relevant. The question of whether the evidence was inflamatory is a balancing question, McCormick, Evidence, p. 319 (1954). The trial judge could determine better than anyone the balance to be struck. McCormick notes the problem and observes (p. 320):

> **"This balancing of intangibles—probative values against probative dangers—is so much a matter where wise judges in particular situations may differ that a lee-way of discretion is generally recognized."**

The courts have generally said that under such circumstances, the matter rests within the sound discretion of the trial judge. **Duvall v. Birden,** 124 Conn. 43, 198 Atl. 255 (1938); **Thompson v. American Steel & Wire Co.,** 317 Pa. 7, 175 Atl. 541 (1934); 31A C.J.S. Evidence, §§ 437, 438. The evidence can hardly be said to be so inflamatory as would evoke the unnessary ire of the jury. Indeed, in the context of the case as whole, it appears to have been one small item of little significance. A jury certainly has some degree of rationality and the evidence received, otherwise relevant and admissible, cannot be said

to be of such a nature as would upset the rationality of the jury.

With reference to appellant's assertions of the bad faith of the district attorney, little need be said, except to note that there was a sound evidentiary predicate for his actions. The intimidatory nature of the appellant's assertions of "warnings" in an effort to extort the prosecutor from his sworn duty are most deplorable. They merely underline a conclusion that should be obvious from the record, that in every lawsuit there are two sides and someone usually loses. Appellant, having lost, may, indeed, feel bitter, but that is no reason to challenge the integrity of the winning counsel, whose only vice was a more sound knowledge of the rules of evidence and deft trial ability.

There is no basis for reversal as to Mr. Nielsen's testimony.

C. **During the Testimony of Mr. Russell.**

Appellant contends that the trial court erred in ruling on the testimony of Mr. Russell as to the question of who was the majority stockholder of Midvale Motors, Inc. The question was relevant since there had been testimony previously given that Ted Newsom had represented that he was the majority stockholder of Midvale Motors, Inc., the company that bought the bitpaver from Nielsen and leased it to the county at an exorbitant rate. The check given Nielsen by Newsom was signed by Newsom as President of Midvale Motors, Inc. (Tr. 176). The ques-

tion put to Mr. Russell was as to the truth of Newsom's assertion and Russell negatived the contention and indicated that Neuman C. Petty was majority stockholder and president of Midvale Motors, Inc. This tended to show that Newsom had falsely represented to make the purchase and then lease to the county, through the appellant, at an unconscionable price. Therefore, it indicated a scheme that was not completely proper and, again, provided a motive for the appellant's untruthful testimony before Judge Jones.

The test of relevancy is whether it is probative and all that is required is "the relation between the propositions for which the evidence is offered and the issues in the case," McCormick, Evidence, p. 315 (1954). It need only "tend to establish the inference for which it is offered." McCormick, op. cit. p. 317; **Redomsky v. United States,** 180 F.2d 781, 783 (9th Cir. 1950). Applying the above test to the situation faced by the trial judge, it is clear that the evidence was relevant. The court's comment that the jury would judge the relevancy was merely another way of advising counsel that the evidence met the test of admissibility and the jury would determine its significance. It should be remembered that trial judges are under the pressure of the case and the articulation of the basis of their ruling may be less than perfect. However, since the evidence was otherwise admissible, the appellant is in no position to complain.

In addition, it can hardly be said that such a ruling would be more than harmless error.

D. **Testimony of the Witness Jensen.**

Appellant, as his final challenge to the court's handling of the evidence, contends impropriety with reference to the testimony of Commissioner Jensen. The basis of the appellant's challenge is predicated on an assumption that Exhibit 15 was only offered in "bad faith" and that it was without probative value. As noted before, infra p. ....., the evidence had direct bearing on the motive of appellant in failing to disclose the lease of the Allis-Chalmers tractor that was leased to the county. The refusal of appellant to truthfully reveal the lease, which was still in effect at the time of his testimony before Judge Jones, must have been predicated, in part, on the realization that this would lead to the disclosure of the proposed lease, Exhibit 15, which was sought by appellant, and was to be executed before the equipment was sold to Motor Lease, Inc., and after the county had the equipment, unless Exhibit 18[5] was a total fraud.

Exhibit 15 was a lease that appellant strongly urged Jensen to adopt, and said he would take before the commission. Jensen told the appellant that the lease was for payments of over $80,000.00. The appellant then appeared surprised and called a Mr. Browning, his assistant. The proposed lease of ap-

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(5) Exhibit 18 was a one-month lease for part of the month of May through part of June. The lease started before Motor Lease, Inc. owned the tractor.

proximately $80,000.00 would have been a fantastic waste of public money, since the machine was purchased by Motor Lease, Inc. for about one-half of the lease rental.

With such a situation, it seems probable that the appellant would have failed to disclose the subsequent leases (which were open to question since they exceed the purchase price of the tractor). Thus, Exhibit 15 was a piece of evidence directly tending to substantiate the appellant's motive for perjury.

As to the bad faith contention, it is interesting to note (a) the trial judge found the evidence relevant, (b) the jury apparently was not offended by its relevance to the claim of perjury, (c) there is a legitimate legal premise for its admission, and (d) the Attorney General finds a direct relationship between Exhibit 15 and the position of respondent on appeal. The assertion of bad faith vanishes. See also infra p. ..... Appellant must live with his wrongdoings and urgent attempts to transfer the blame to the prosecution cannot sustain his position on appeal.

E. **Summary of Appellant's Claims of Evidentiary Error.**

The appellant has placed a summary of contentions in his brief with reference to the alleged errors of the trial court in ruling on the admissibility. Respondent has cited its authorities and set forth its rebuttal argument in the portion of its brief where each contention of error is discussed. Consequently, there is little need to rehash the claims of hearsay,

bad faith or relevance. Appellant's arguments are not applicable to the facts of this case.

However, respondent feels it important to rebut any contention made by the appellant that the trial judge abandoned his role in ruling on the evidence to the discretion of the jury. In actual fact, all the court did was leave to the jury the determination of what weight the jury should accord to otherwise relevant evidence. Although juries may not have the sophistication of counsel, they generally have the sophistication and maturity of the experience of life. Recent studies have shown the jury to have unusual wisdom and insight and to use reasonable judgment, Joines, **Civil Justice and the Jury** (1962).

It is submitted that it is clear from the record that when the discretion of the trial judge is weighed against the whole case, there was no error, or if there was, it was so slight as to be harmless.

POINT III

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN THE INSTRUCTIONS GIVEN TO THE JURY OR IN NOT GIVING THE REQUESTED INSTRUCTIONS OF APPELLANT.

The appellant contends that the trial court erred in giving instructions No. 2 and No. 15, in that they were erroneous, and that other instructions (Nos. 14, 15, 16, and 6) contained defects.

Instruction No. 2, set out in appellant's brief, p. 56, merely appraises the jury of the allegations in the indictment and instructed the jury on the

prosecution's theory of the case. The instruction was not given in the abstract, but was tailored to the evidence and issues that had been raised before the court. The instruction also highlighted for the jury the four areas wherein the prosecution alleged that the appellant had perjured himself. The court framed the instruction so that the procedural circumstances of the appellant appearing before Judge Jones were intelligible against the allegations in the indictment. This action of the trial judge was clearly what he was compelled to do, if he were to comply with cases previously decided by this court. In **State v. Thompson,** 110 Utah 113, 170 P.2d 153 (1946), this court criticized the trial court for **not** doing what the trial judge in this case did. The court observed:

> **"We have repeatedly criticized the giving of abstract statements of the law to the jury, and held that it is the duty of the court to apply the law to the facts supported by the evidence and to not instruct on any question which is not involved in the case under the evidence. (citing cases) We think that it cannot be too strongly emphasized that the court should apply the law to the facts as they appear from the evidence, and should instruct only on the law which has a bearing on facts, and in stating the necessary elements to constitute the crime charged it should submit to the jury the facts involved in the case and not merely generalizations, and where possible should avoid the use of technical legal terms and cumbersome definitions thereof, by using terms which will readily be understood by laymen. In that way, the jury will be given a much clearer understanding of its problems."**

Thus, this court has heretofore expressed its position in favor of tailoring the law to the facts in such a manner as would make the instruction meaningful in the context of the case in which it is given. Indeed, the posture of the State's case was pinpointed in reference to the State's factual allegations. Appellant, it would seem, would have had the judge instruct on abstract rules of law. By properly tailoring the instructions and pinpointing the essential contentions of the prosecution, he was helping the jury to see the particular issues they were required to determine. Appellant complains that in Instruction No. 2, the jury was advised that the failure of appellant to reveal the Alles-Chalmers tractor that was leased was the essence of the question of whether the appellant perjured himself in speaking to the question of other leased equipment. This was the very contention of the prosecution and the only issue of evidence on the matter; consequently, it was perfectly proper for the court to pinpoint the issue against the facts. The court was not compelled to charge the jury in the exact language of the indictment so long as the instruction otherwise reasonably informs the jury of the law applicable to the case. Indeed, in the Thompson case, supra, this court encouraged trial courts to refrain from using technical legal language. There is no error on this point.

Appellant's second contention is that the court erred in giving Instruction No. 15. The respondent submits that there is absolutely no merit to this point. The instruction must be examined as whole to see

if it adequately explains the law to the jury. The first sentence of Instruction No. 15 advises the jury of the required standard of proof in witnesses and corroborating circumstances. The second paragraph defines what is a corroborating circumstance. The third paragraph, which is the paragraph to which appellant objects, explains that corroborative circumstances can be circumstantial or direct and that the entire conduct as witness in his own behalf "before a city judge" and at other times may provide the corroboration. It is submitted that the instruction, when taken as a whole, is adequate and not prejudicial.

Appellant says that the district attorney took exception to Instruction No. 15, which is true; however, thereafter, the court amended the instruction by interlineation and confined the testimony portion of the instruction to the appellant's apeparance in the city court. This avoided a possible inference from his failure to take the stand in his own behalf. Therefore, no ground can be claimed by the appellant from the district attorney's action.

The appellant's claim that the instruction emasculates the so-called "quantitative rule," required, in some instances, in proof of perjury, is without merit. The instruction merely advises the jury of certain sources that may be considered in determining whether the required corroboration has been shown.

In 41 Am. Jur., **Perjury,** p. 38, it is observed:

> **"The corroboration of a single witness for the prosecution in a perjury case may be by circumstantial evidence."**

In addition, in 41 Am. Jur., **Perjury,** § 68, it is observed in part:

> **"As a general rule, evidence of conduct showing consciousness of guilt, such as flight, may serve as a requisite corroborative circumstance to a statement of an accusing witness warranting conviction under an indictment for perjury. Motive and design to commit a crime, if proved, may also be considered a guilty circumstance and, consequently, may serve legally as corroborative evidence."**

See also Anno. 111 A.L.R. 828.

Thus, the court's instruction was not improper. Additionally, as noted before, the quantitative evidence rule is of doubtful application in Utah, at least to the extent appellant urges.

The appellant's contention that the instruction somehow would cause the jury to believe that the appellant was charged in the John Doe complaint with the crime set forth is a torturous assertion. At the time the instruction was given, the jury had heard all the vidence and knew of the documents. They knew that the appellant and others were called as witnesses subsequent to the issuance of Exhibit P-1. They were, it is submitted, more likely to believe the truth as set forth in the evidence that

the appellant was, along with others, interrogated to see if he knew or took part in the wrongdoing alleged. There could, therefore, have been no prejudice to appellant from Instruction No. 15.

Appellant finally merely asserts that Instruction No. 14 is inconsistent with Instructions 15 and 16, but does not disclose the nature of the inconsistency. Instruction No. 14 merely defines direct and circumstantial evidence and in no way is inconsistent with Instructions 15 and 16.

Further, the assertions with reference to Instruction No. 6 that it is unintelligible and incomprehensible is argumentative, and a reading of the instruction, in light of all the instructions given, supports a conclusion that it provides no basis for a claim of prejudicial error.

This court has on numerous occasions specified that in determining a claim of insufficiency or erroneous instructions, that the instructions given must be viewed as a whole. **State v. Hendricks,** 123 Utah 267, 258 P.2d 452 (1952); **State v. Evans,** 107 Utah 1, 151 P.2d 196 (1944); **State v. Coleman,** 17 Utah2d 166, 406 P.2d 308 (1965). When the instructions given in the instant case are viewed in accordance with the above rule, it is clear that they were adequate and provide no basis for reversal.

Finally, appellant contends that the court should have given his requested instructions Nos. 2 and 3. Instruction No. 3 was merely a statement on the required evidence to prove perjury. However, the in-

struction is apparently little different than Instruction No. 15, as given by the court. Only the language of Instruction No. 15 is challenged, not the substantive explanation of the law.

It is well settled that a party has a right to have the jury instructed in the language of his proposed instructions, if the law is otherwise adequately stated. In **People v. Chadwick,** 7 Utah 134, 25 Pac. 737 (1891), this court observed:

> "While the above instrution was not given in the language of the learned counsel presenting them, yet it embodies the substance of the request, and leaves the question to the jury as a circumstance for them to consider, and to say whether, under all the facts and circumstances shown, possession of stolen property was evidence of guilt or not; and at the same time the court instructed the jury that possession alone is not sufficient evidence upon which to convict. These instructions were given with reference to the proofs before them at the time, which the jury must have understood and applied with reference to such facts of possession as were shown; and, while the instruction was not as full and explicit as it might have been, yet it sufficiently covered the question presented.
>
> * * * *
>
> Where the charge of the court, as a whole, covered the questions embraced in the request to charge, so as to fairly submit them to the jury, and leave the question for them to pass upon, it is not error to refuse the request to charge, though technically good in law. In such cases the court is not bound to use the language of the counsel, but may use his own."

See also, Abbott, Criminal Trial Practice, 4th Ed., § 663.

The same conclusion applies to the appellant's contention as to his requested Instruction No. 2. The material was adequately covered in Instructions 3 and 5, as given.

It is submitted that when the instructions given are taken as a whole and in light of the evidence and posture of the case, there was no prejudicial error warranting reversal.

POINT IV

THE TRIAL COURT CORRECTLY OVERRULED THE APPELLANT'S MOTION TO SUPPRESS THE TESTIMONY OF JUDGE JONES.

The appellant argues on appeal that the testimony of Judge Jones should have been suppressed. On appeal, two bases are urged for the contention. First, it is asserted that since the complaint signed by Delmar Larson did not expressly state that the name of the accused person was unknown, this prevented the proceeding from being a proper one. It is submitted that this is a hypertechnical assertion. The use of the name John Doe was a sufficient means of alleging the lack of identity of the accused. No particular form is required to state lack of knowledge, and the use of the term "John Doe" universally is understood to have a meaning that the actual name is unknown. Even so, this would not be a

basis for suppression. In 41 Am. Jur., **Perjury,** § 25, it is stated:

> "Generally, the fact that jurisdiction of a court which has general jurisdiction of an offense does not properly attach to the particular case in which the perjury charged is alleged to have been committed, because the complaint in the case has not been sworn to, does not defeat the charge of perjury. Moreover, while perjury cannot be assigned on alleged false testimony given in the course of a trial, where the court has no jurisdiction of the offense charged or of the defendant, yet if the proceedings are merely erroneous or voidable, even if there are such irregularities or defects as will require a reversal of the cause on appeal, false testimony given in the course of such trial, if material, constitutes perjury. Hence, perjury may be assigned on the testimony in a criminal trial before justices, nothwithstanding the warrant on which the defendant in such trial was arrested was illegal, having been issued without a written oath or information."

The allegation of appellant, when accepted in a light most favorable to him, shows only a minor irregularity at best. Consequently, this would be no basis for suppression.

The second basis[6] upon which appellant contends the testimony he gave before Judge Jones should be suppressed is on the theory that his testimony was given as a deposition and, consequently, he should have been given an opportunity to examine the deposition and make what changes he

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(6) Appellant challenged the proceedings on several other grounds, but has abandoned those on appeal.

desired and then sign it. It is submitted that there is no merit to such a contention.

Section 77-11-3, Utah Code Annotated, 1953, was the section under which Judge Jones was proceeding when appellant appeared before him. That section reads:

> **"When a complaint is made before a magistrate charging a person with the commission of a crime or public offense, such magistrate must examine the complaint, under oath, as to his knowledge of the commission of the offense charged, and he may also examine any other persons and may take their depositions."**

The section allows the magistrate to "examine any other persons **and** take their depositions." When the appellant appeared before Judge Jones, he was examined. He was administered an oath and swore to tell the truth. He was, thereafter, interrogated concerning the "John Doe" complaint pending before the magistrate. This was an examination and a judicial proceeding. The conjunctive allows the magistrate to have the testimony reduced to writing. The deposition is a distinct certification apart from the examination made under oath by the witness. Section 76-45-1(1), Utah Code Annotated, 1953, provides:

> **"A person is guilty of perjury who**
>
> **(1) Swears or affirms that he will truly testify, declare, depose or certify, or that any testimony, declaration, deposition, certificate, affidavit or other**

> writing by him subscribed is true, in, **or** in connection with, any action or special proceeding, hearing, or inquiry ,or on any occasion in which an oath is required by law **or** is necessary for the prosecution or defense of a private right or for the ends of public justice or may lawfully be administered, and who in such action or proceeding or on such hearing, inquiry or other occasion willfully and knowingly testifies, declares, deposes or certifies falsely or states in his testimony, declaration, deposition, affidavit or certificate any matter to be true which he knows to be false."

Thus, any false testimony given at any hearing or inquiry, **or** in any deposition is perjury, assuming the presence of other elements. Consequently, the magistrate's examination was a sufficient judicial proceeding to make the rendition of false oral testimony perjurious. In, Burdick, Law of Crime, Vol. I, § 328, it is observed:

> "It is necessary at common law in order to constitute perjury, that the false testimony be given in a judicial proceeding, but that term is a very broad one. It may be either in a court of law or of equity, but it need not be before any court; it may be before commissioners, in an answer in chancery; upon some collateral matter not directly connected with the issue of a cause on trial, or an affidavit to hold to bail; or when one offering himself as bail, swears his property to be greater than it is; or the crime may be committed in some court of justice having power to administer oath, **or before some magistrate invested with similar authority,** in some proceeding relative to a civil suit or criminal prosecution.

> It has also been held perjury in a judicial proceeding where one falsely takes a poor debtor's oath before a magistrate, or gives false testimony under oath before a grand jury, or where a juror testifies falsely when examined on his **voir dire."**

Thus, this was a judicial proceeding within the perjury statute. The normal giving of a deposition in a civil matter may not be. In any event, the subsequent transaction of the appellant's testimony imposed no greater requirement and the false oral testimony before the magistrate was enough to meet the statutory elements for perjury. See also Clark & Marshall, Crimes, 6th Ed., Wingersky, p. 916.

Appellant argues that since Section 77-44-2, Utah Code Annotated, 1953, makes the rules of evidence applicable in criminal cases that are applicable in civil cases, a requirement of authentication is necessary. It is submitted that the procedure appelland argues for is not a rule of evidence, but one of procedure, and Section 77-44-2 Utah Code Annotated, 1953, is inapplicable.

Section 76-45-6, Utah Code Annotated, 1953, must be read in light of Section 76-45-1, Utah Code Annotated, 1953, and when so done, it is apparent that false oral testimony in a proceeding before a magistrate is sufficient. Further, lack of authentication is no defense, since Section 76-45-3, Utah Code Annotated, 1953, provides that an irregularity in administering the oath is no defense. It is submitted that this would be a similar situation, a minor irregularity that would not remove the taint of false, sworn testimony orally given, 70 CJS, Perjury 22 C.

It is submitted that the trial court did not err in denying the motion to suppress.

POINT V.

THE INDICTMENT RETURNED BY THE SALT LAKE COUNTY GRAND JURY WAS SUFFICIENT.

The appellant, as his final claim on appeal, contends that the indictment returned by the Salt Lake County Grand Jury, charging him with perjury in the first degree, was defective and that the trial court should have granted his motion to quash. The essence of the appellant's contention is a claim that it is essential to sustain an indictment for perjury that the form of an indictment contain an annotation either (1) that the testimony given was material or (2) that the materiality of the alleged testimony be spelled out in the indictment. It is submitted that there is no merit to the appellant's position.

The first case in Utah considering the sufficiency of an indictment for perjury was **People v. Greenwell,** 5 Utah 112 (1886). It is admitted that in the Greenwell case, the indictment expressly mentioned that the testimony given before a grand jury in Weber County, Territory of Utah, was material. However, a reading of that case shows that there is no precedent for an allegation that materiality must be set forth with particularity under present-day pleading standards, since under the Criminal Practice Act of 1878 and Sections 164 and 158 thereunder, which was in effect at the time of the Green-

well case, the statutes expressly made mandatory the recitation of materiality.

In **State v. Anderson,** 35 Utah 496, 101 Pac. 385 (1909), the appellant was charged with perjury. The sufficiency of the indictment was challenged upon the concept of duplicity. It is worth noting that in the Anderson case, the court noted that under Section 46110, Compiled Laws of Utah 1907, only four elements were necessary to sustain a complaint, and the information in the Anderson case did not specifically mention materiality, although, admittedly, the facts pleaded were sufficient to show materiality. Neither the Anderson case nor the Greenwell case dealt with present requirements of pleading.

Section 77-21-8, Utah Code Annotated, 1953, sets forth the general standards for informations and indictments. This provision was enacted in 1935, Laws of Utah 1935, Chapter 118, Section 1, and was part of a general modernization of the State Code of Criminal Procedure, based upon the American Law Institute's Model Code, promulgated in 1930. The above section now provides:

> **"(1) The information or indictment may charge, and is valid and sufficient if it charges the offense for which the defendant is being prosecuted in one or more of the following ways:**
>
> **(a) By using the name given to the offense by the common law or by a statute.**
>
> **(b) By stating so much of the definition of the offense, either in terms of the common law or of the statute defining the offense or in terms**

> of substantially the same meaning, as is sufficient to give the court and the defendant notice of what offense is intended to be charged.
>
> (2) The information or indictment may refer to a section or subsection of any statute creating the offense charged therein, and in determining the validity or sufficiency of such information or indictment regard shall be had to such reference." (Emphasis added.)

Thus, an information or indictment is sufficient, if it charges the crime in any one of the ways set forth in Section 77-21-8, Utah Code Annotated, 1953. Subsection 1(a) of the above cited section provides that the offense is sufficient for judicial purposes, if the name given it by common law or the statutory reference is plead. The indictment in the instant case is sufficient for two reasons: (1) the statutory reference is contained in the indictment, and (2) the indictment expressly refers to the crime of perjury in the first degree.

In **State v. Hill,** 100 Utah 456, 116 P.2d 392 (1941), this court acknowledged that the purpose of the new form of pleading was clearly to get away from the technicalities of pleading that existed at common law. This position was reaffirmed in **State v. Landrum,** 3 Utah2d 372, 284 P.2d 693 (1965), upholding a conviction of the crime of robbery, where the information merely charged that defendant robbed victim. Thus, there is a clear statutory evolution away from the technicalities of pleading that were required at the time of **People v. Greenwell,** supra.

It is submitted that the indictment in this case, having met one of the statutory standards, is sufficient.

In **State v. Spencer,** 101 Utah 274, 117 P.2d 455 (1942), this court was charged with considering the sufficiency of a perjury information. The court noted, with reference to Section 77-21-8, Utah Code Annotated, 1953:

> "Section 105-21-8 of Chapter 118, Laws of Utah 1935, quoted supra, provides that an offense may be charged in an information in three ways: (a) By using the name given by the statute; (b) By stating enough of the terms of the statute defining the offense as is sufficient to give the court and the defendant notice as to which offense is intended to be charged; or (c) By citation of, or reference to, the section or subsection of the statute creating the offense charged in the information."

The court then went on to observe:

> "Conformance with either of these three permissive ways of charging the offense would have apprised the court and the defendant of what offense was intended to be charged so the plea could be entered, defense prepared and the penalty be known and opposed, if such steps become necessary."

Thus, the Spencer case is direct precedent in this jurisdiction for the conclusion that since the indictment in this case complied with the statutory standards of Section 77-21-8, Utah Code Annotated, 1953, that appellant's objection was unmeritorious, and the trial court properly denied the motion to quash.

Further, it should be noted that the indictment in the instant case met the recommended statutory form set forth in Section 77-21-47, Utah Code Annotated, 1953. Admittedly, these forms are exemplary. **State v. Spencer,** 101 Utah 274, 121 P.2d 912 (1942). However, in this instance, by using a statutory form, the statutory criteria in Section 77-21-8, Utah Code Annotated, 1953, were fully complied with.

In **State v. Hutchinson,** 4 Utah2d 404, 295 P.2d 345 (1956), this court overruled the Spencer case on other grounds. However, in doing so, it did indicate that compliance with the statutory form of pleading recommended in Section 77-21-47, Utah Code Annotated, 1953, was sufficient. This court said:

> "Without determining the debatable question as to whether this language was dictum or not, logic would dictate that without such language the conclusion is almost inescapable that one offense was included in the other and an accusation of perjury, without specifying the degree, **would have been sufficient, since applicable statutes seem to say so and actually authorize perjury in the following form: 'A. B. committed perjury by testifying as follows:."** (Emphasis added.)

The respondent admits that some cases have definitely advocated a proposition of expressly indicating the materiality of the testimony in the indictment or information. However, there is a very definite split of authority, which seems to depend upon the particular statutory or procedural rule in effect in the jurisdiction, 41 Am. Jur., **Perjury,** § 44. See also 70 C.J.S., **Perjury,** § 44.

Most recently, in **State v. Burch,** 413 P.2d 805 (Utah 1966), an appellant from a burglary conviction, challenged the sufficiency of the information. This court rejected the contention, finding the information sufficient and stated:

> **"Defendant says the information was insufficient to support the conviction. We think there is no merit in this contention, since it contained the name of the offense and the statute under which it was drawn."**

The court cited **State v. Courtney,** 10 Utah2d 200, 350 P.2d 619 (1960), in support of its conclusion. A similar result was reached in **State v. Dodge,** 415 Pac. 212 (Utah 1966).

Other states have apparently recognized that there is no necessity for an allegation of the materiality of the perjury under procedures of pleading comparable to those in Utah.

In **State v. Hawley,** 186 N.C. 432 119 SE 88 (1923), the North Carolina Supreme Court was charged with considering the effect of the short form of indictment or information on the requisite of pleading the materiality of the alleged perjured testimony. The court concluded that although the failure would have been fatal under previous statutes, that the enactment of the new provision dispensed with the necessity of an allegation as to the materiality of the perjured testimony.

States immediately surrounding Utah, having comparable statutory provisions and a similar ident-

ity of interest, have rejected the contention now urged by the appellant.

In **State v. Chee,** 74 Ariz. 402, 250 P.2d 985 (1952), the Arizona Supreme Court ruled that under the new Rules of Criminal Procedure in effect in Arizona, an indictment which charged the accused with falsely answering a question as a witness before a grand jury in a manner very comparable to that charged in the instant case, was a sufficient allegation, and the absence of an allegation as to materiality would not affect the sufficiency of the indictment.

In **People v. Swanson,** 109 Col. 371, 125 P.2d 637 (1942), the Colorado Supreme Court noted that the indictment involved followed the identical forms prescribed by statute, and found the reference to materiality unnecessary.

It is submitted, therefore, that the absence of an allegation of materiality is not such a sufficient defect as would warrant a conclusion that the indictment in this case was fatally defective. The cases cited in appellant's brief in support of his contention either involve cases where the common law form of pleading or a derivative thereof is the standard procedural code of pleading, or involve cases decided well before the promulgation of the American Law Institute's Model Code of Criminal Procedure in 1930, upon which the Utah procedure is based.

This court, in **State v. Hill,** supra, took an identically inopposite conclusion as to the constitutional-

ity of the procedural form of a pleading than that taken in **State v. Webber,** 78 Vt. 463, 62 Atl. 1018 (1906), upon which appellant relies.

The indictment in the instant case clearly alleges that the appellant testified falsely before the Honorable Maurice D. Jones, judge of the City Court of Salt Lake City, after having been duly sworn, and testified "to the following material facts." (R.1).

Generally, as noted in 41 Am. Jur., **Perjury,** § 44, an indictment is sufficient "by showing an action at issue in a court of competent jurisdiction, the testimony given, coupled with the averment that it was material to the issue." This was the action taken in the indictment in the instant case and is, therefore, generally sufficient. 80 A.L.R. § 1443.

It is submitted that there is no merit to the appellant's contention. He was adequately apprised, both at the time he appeared before Judge Jones and subsequent to the indictment, of the allegations against him. Appellant's urgings at this appeal would ask this court to turn the clock back on the modernization of criminal justice in the area of pleading. This court has refused to do so on numerous occasions. **State v. Robbins,** 102 Utah 119, 127 P.2d 1042; **State v. Avery,** 102 Utah 33, 125 P.2d 803; **State v. Landrum,** supra; **State v. Hill,** supra; **State v. Courtney,** supra; **State v. Burch,** supra; and **State v. Dodge,** supra. Obviously, therefore, the appellant cannot contend that the indictment was insufficient upon which to sustain the prosecution.

The appellant's contention on the necessity of spelling out the matter of inquiry before the grand jury is also, for the above reasons, without merit.

CONCLUSION

The appellant has challenged his conviction on several grounds, the primary of which is the insufficiency of the evidence. When the evidence is viewed in a light most favorable to the jury's verdict, it is obvious that it is sufficient to sustain appellant's conviction. Appellant has challenged the good faith of the trial judge, the district attorney, and the very proceedings before which he falsely gave testimony. It is submitted that there is no benefit to the appellant's attempts to place the guilt upon everyone but himself. At the time of trial, he offered no explanation for his conduct, and the evidence sufficiently sustained the jury's verdict. Allegations that prejudicial error was committed in the evidence and instructions are not sustained, when subjected to scrutiny. Appellant's contention that the evidence of his perjury should have been suppressed is based upon a hypertechnical argument and not sustained by analysis or authority. Finally, the allegation as to the insufficiency of the indictment melts in the presence of close analysis, and there is no merit to this position.

When the full nature of the proceedings are examined against the allegations which appellant now claims require reversal, it is apparent that there is no merit to his position on appeal.

This court should affirm.

Respectfully submitted,

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